

WORKING

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

ENDORSED FILED

In re:

Request for Regulatory)
Determination filed by)
Jerald K. Garber con-)
cerning Department of)
Corrections' policy of)
denying "Credit for)
Participation" under)
Title 15, California Code)
of Regulations, section)
3042¹)

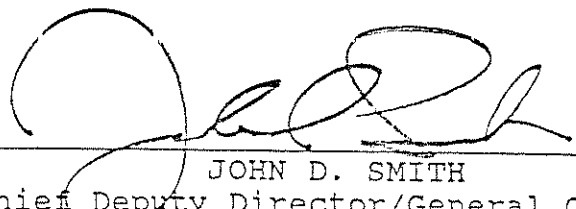
1988 OAL Determination No. 10

[Docket No. 87-016] OF STATE

June 22, 1988

Determination Pursuant to
Government Code Section
11347.5; Title 1, California
Code of Regulations,
Chapter 1, Article 2

Determination by:


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SYNOPSIS

The issue presented to the Office of Administrative Law was whether the Department of Corrections' policy of denying prison inmates "Credit for Participation" under section 3042 of Title 15 of the California Code of Regulations is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Department of Corrections' policy is not a "regulation" because it is the only legally tenable interpretation of the underlying law. The Office of Administrative Law recommends that the Department of Corrections either amend or repeal the misleading regulation (section 3042) because it is legally inconsistent with subsequent statutory and regulatory enactments.

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THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine³ whether the Department of Corrections' ("Department") policy of denying "Credit for Participation" under section 3042 of Title 15 of the California Code of Regulations (CCR) is a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore violates Government Code section 11347.5, subdivision (a).⁴

THE DECISION 5, 6, 7, 8

The Office of Administrative Law finds that the Department of Corrections' policy of denying "Credit for Participation" under section 3042 is (1) not a "regulation" and (2) is not subject to the requirements of the APA.⁹

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.¹⁰ The Legislature has thus entrusted the Director of Corrections with a "difficult and sensitive job":¹¹

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein" ¹²

Authority ¹³

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

Penal Code section 2934 provides in part:

"Under rules prescribed by the Director of Corrections, a prisoner subject to the provisions of Section 2931 may waive the right to receive time credits as provided in Section 2931 and be subject to the provisions of Section 2933" [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

In 1975, the Legislature overturned a 1973 court case¹⁴ (which had found the Department exempt from the APA) by specifically providing that prison administration rules are to be adopted pursuant to the APA.

This 1975 enactment amended Penal Code section 5058, subdivision (a), which currently provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]¹⁵

The APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁶ Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.¹⁷

General Background

To facilitate understanding of the issues presented in this Request, we will discuss pertinent statutory and regulatory history, as well as the undisputed facts and circumstances that have given rise to the present Determination.

Prior to January 1, 1983, a state prisoner could reduce his or her period of confinement by one-third by earning credits for program participation, referred to collectively as "conduct credits".¹⁸

Prior to January 1, 1983, former Penal Code section 2931, subdivision (c), provided in part that:

"One of the four months reduction or a formula based on this ratio for a lesser period shall be based solely upon participation in work, educational, vocational, therapeutic or other prison activities"
[Emphasis added.]

Current Penal Code section 2931 retains the earning of "conduct credits" in a ratio of up to three months of good-behavior credit for each eight months served and up to one month of participation credit for each eight months served, for a total of up to one-third off the time which would otherwise be spent in custody.

The maximum amount of "conduct credits" under Penal Code section 2931 that the Department is legally authorized to grant is one-third, i.e., four months for each 8 months of good behavior and participation.¹⁹

On June 13, 1977--prior to the creation of OAL²⁰--section 3042 of Title 15 of the CCR became effective.

Section 3042 ("Credit for Participation"), which has not been amended since September 29, 1977, currently states:

"All inmates serving a determinate term of imprisonment will be credited with a one-twelfth reduction on their term of imprisonment calculated from July 1, 1977 or from the date of reception by the department if received at a later date, unless all or part of such credit has been denied or forfeited as the result of disciplinary action for failure or refusal to participate and perform work and program assignments as ordered or directed."
[Emphasis added.]

The regulation does not have Authority or Reference citations.²¹ It is apparent from the regulation text, however, that the one-twelfth participation credit, i.e., one month per year--although expressed as a different ratio--is the regulatory implementation of Penal Code section 2931, subdivision (c)'s one month reduction for participation.

Persons convicted on, or after January 1, 1983, are not governed by section 2931, but may participate in the "worktime credit" program specified in Penal Code section 2933.22, 23, 24

Section 2933, subdivision (a) provides in part that:

"It is the intent of the Legislature that persons convicted of a crime and sentenced to state prison, under Section 1170, serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections. . . . For every six months of full-time performance in a credit qualifying program, as designated by the director, a prisoner shall be awarded worktime credit reductions from his or her term of confinement of six months. A lesser amount of credit based on this ratio shall be awarded for any lesser period of continuous performance. Less than maximum credit should be awarded pursuant to regulations adopted by the director for prisoners not assigned to a full-time credit qualifying program. Every prisoner who refuses to accept a full-time credit qualifying assignment or who is denied the opportunity to earn worktime credits pursuant to subdivision (a) of Section 2932 shall be awarded no worktime credit reduction. . . . Under no circumstances shall any prisoner receive more than six months' credit reduction for any six-month period under this section. [Emphasis added.]

Under Penal Code section 2933, prisoners may earn "half time credits" ("worktime credits") which would result in a reduction of their sentence by a maximum of six months for any qualifying six-month period.

Penal Code section 2934 declares that:

"Under rules prescribed by the Director of Corrections, a prisoner subject to the provisions of Section 2931 may waive the right to

receive time credits as provided in Section 2931 and be subject to the provisions of Section 2933. In order to exercise a waiver under this section, a prisoner must apply in writing to the Department of Corrections. A prisoner exercising a waiver under this section shall retain only that portion of good behavior and participation credits, which have not been forfeited pursuant to Section 2932, attributable to the portion of the sentence served by the prisoner prior to the effective date of the waiver. A waiver under this section shall, if accepted by the department, become effective at a time to be determined by the Director of the Department of Corrections."

Sections 3043 ("Credit Earning") and 3043.1 ("Waiver") went into effect December 17, 1982, as emergency regulations which became effective on a permanent basis on April 16, 1983. Both sections have had subsequent changes; changes which have not, however, effected the parts of the regulations pertinent to the matter before us.²⁵

Section 3043 of Title 15 of the CCR currently provides in part:

" . . . (a) Behavior. All inmates serving a determinate term of imprisonment, or who are serving an indeterminate term of 15 YEARS TO LIFE or 25 YEARS TO LIFE for a crime committed before January 1, 1983, who have not waived the time credit provisions of Penal Code Section 2931, shall be credited with a one-fourth reduction on their term of imprisonment or minimum eligible parole date, unless all or part of such good behavior credit is denied or forfeited as the result of disciplinary action in the amounts listed in Section 3323. Such credit shall be calculated from July 1, 1977 or the date of reception by the department, whichever is later.

(b) Participation. All inmates described in subsection (a) shall be credited with a one-twelfth reduction on their term unless all or part of such participation credit has been denied or forfeited as the result of disciplinary action for failure or refusal to participate and perform work and/or program assignments as ordered or directed.

(c) Work time.

(1) An inmate serving a determinate term of imprisonment or an indeterminate term of 15 years to life or 25 years to life for a crime committed on or after January 1, 1983, or who has waived their right to behavior and participation credits as provided in Penal Code Section 2934, may earn a reduction in their term of imprisonment or minimum eligible parole date, from the date of reception by the department or effective date of the waiver. Such credit reduction may be earned for participation in work, educational or vocational training assignments. . . ." [Emphasis added.]

Section 3043.1 of Title 15 of the CCR declares in part that:

"(a) Any inmate described in section 3043(a) may waive the right to receive behavior and participation credit and thereafter be eligible to earn worktime credits in the amounts provided for in section 3043(c).

(b) All credit attributable to the portion of the inmate's sentence served prior to the effective date of the waiver shall be retained by the inmate unless such credit has been forfeited for a disciplinary offense. This credit includes all presentence custody and good behavior credit; credit granted under Penal Code Section 4019; post-sentence credit; actual days in custody from date of reception and behavior and participation credit attributable to that actual custody.

(c) A waiver shall be effective on January 1, 1983 if signed on or prior to that date. If signed at a later date, such waiver shall be effective on the date the inmate's assignment to a credit qualifying program is verified. In instances where any inmate serving a sentence prior to January 1, 1983 was not provided with an opportunity to sign a waiver, the waiver shall be effective on such date that the inmate would otherwise have been eligible because of a qualifying work/training assignment. Accepted waivers shall be irrevocable.

(d) [Emphasis added.]

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A Request for Determination was filed with OAL on September 11, 1987, by Jerald K. Garber ("Requester"). The Requester first signed a waiver to earn the half time work credits instead of the one-third conduct and participation credits, then requested through the inmate appeal process²⁶ that section 3042's one-twelfth participation credits also be applied to his estimated release date. The Requester argues that he had only waived the right to section 3043, subdivision (b) credits and that because section 3042 is a separate regulation, he is entitled to the additional one-twelfth credit.

The Department's response to the Requester's appeal stated the following policy:

"Appeal Granted. [sic] In reviewing your C-file, the court sentenced you under the Determinate Law. This law directs the Department of Corrections to not only grant you 1/12th reduction in your term for participation but also a 1/4th reduction for behavior credits. As you know thru elementary addition of fractions this equals 1/3 credit. Therefore the section you cited from Title 15 grants an inmate sentenced under the Determinate Sentencing Law (DSL) to 1/3 off his total term. Your date under this law is approximately 12-22-90.

"Effective 1-1-83, the Work Incentive program became law. This law entitles all inmates who have committed their offense after 1-1-83 the opportunity to earn 1/2 off their total term of confinement. Section 3043.1 of the Director's Rules (Title 15) affords the inmate the opportunity to opt into the Work Incentive program by signing a waiver and earn 1/2 off their term instead of 1/3rd.

"Mr. Garber on 10-10-85, you made a personal appearance before the Classification Committee at CMF and freely chose to sign a waiver entitling you to earn 1/2 off your term effective 8-11-85. When you signed this waiver you received an EPRD of 8-15-89.

"When records computed your EPRD you were granted the 1/2th plus 1/3rd time credits from 7-3-85 to 8-10-85 (the day before your waiver became effective). Therefore you have received the credits you request, while you were a DSL case. On 8-11-85, you opted in to Work Incentive and began receiving 1/2 time credits."

On May 23, 1988, the Department filed its Response to the Request. We need not, however, discuss the Department's arguments that the policy does not violate Government Code section 11347.5 because of our conclusion that the departmental policy in issue is not regulatory.

II. DISPOSITIVE ISSUES

There are two main issues before us:²⁷

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure,
" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of this inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²⁸ It has been judicially held that "rules significantly affecting the male prison population" are of "general application."²⁹ The challenged rule is clearly a rule of general application significantly affecting the prison population in the custody of the Department. All prisoners in Mr. Garber's category are denied 1/12 participation credits.

The answer to the second part of inquiry, however, is "no." The rule at issue here was not "adopted by the agency." The challenged rule was adopted by the Legislature.

It is true that Requester's argument that section 3042 is separate from the granting of credits under 3043.1 is bolstered by the fact that section 3042 is located in Title 15 of the CCR, Article 3 ("Work and Education") while 3043.1 is placed in Article 3.5 ("Credits").

Analysis of the underlying law clearly demonstrates, however, that the Department is only authorized to credit a prisoner with either Penal Code section 2931's one-third "conduct and participation credits" (3 months = 3/12, 1 month = 1/12; 3/12 + 1/12 = 4/12 or 1/3) or Penal Code section 2933's "half-time work credits" (six months credit per year).

Requester states he executed a waiver, which is irrevocable³⁰. Therefore, after executing the waiver, he can only earn six months of "worktime credits" per six month period. Penal Code section 2933 clearly states "Under no circumstances shall any prisoner receive more than six months'

credit reduction for any six month period under this section." If the Department were to permit a prisoner to earn "participation" credits under Penal Code section 2931 in addition to section 2933's "work time credits," the Department would be in violation of the legislative scheme. Penal Code section 2934 specifies that prisoners may waive 2931 credits in order to qualify for the more generous half time work credits.

Therefore, the Department's policy is the only legally tenable interpretation of sections 3043 and 3043.1 of Title 15 of the CCR and Penal Code sections 2931, 2933 and 2934.³¹

This still leaves, however, the paradox of a presumptively valid--but, in the final analysis, void--section 3042. Section 3042 appears to have been in substance subsumed into the provisions of section 3043, subdivision (b), but remains "on the books"--thereby creating confusion.

The Department has an implied affirmative duty to review and update its regulations. Section 3042 requires either amendment or repeal in order to be internally consistent with the Department's regulatory scheme and the underlying statutory scheme.

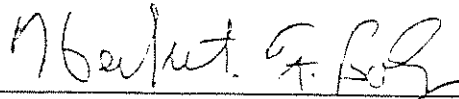
WE THEREFORE CONCLUDE THAT THE DEPARTMENT'S POLICY OF DENYING SECTION 3042 ONE/TWELFTH PARTICIPATION CREDITS IS NOT A "REGULATION" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b). BECAUSE THE CHALLENGED DEPARTMENTAL POLICY IS NOT A "REGULATION", WE NEED NOT INQUIRE WHETHER THE CHALLENGED POLICY FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION³² TO APA REQUIREMENTS.

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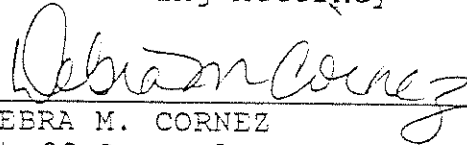
III. CONCLUSION

For the reasons set forth above, OAL finds that the Department's policy of denying section 3042 one/twelfth participation credits is not a "regulation" as defined in Government Code section 11342, subdivision (b).


DATE: June 22, 1988



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WT/HB

- 1 This Request for Determination was filed by Jerald K. Garber, D-09801, P. O. Box 3535, Dorm 101140, Norco, CA 91760. The Department of Corrections was represented by Staff Counsel Marc Remis, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute. In Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693, the court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism."

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121(a)

provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

- 4 Government Code section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set

aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 & 125. The comment submitted by the affected agency is referred to as the "response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful,

if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, no public comments were submitted to OAL. The Department submitted a Response to the Request for Determination which was considered in making this Determination.

- 7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subdivision (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
- 8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 1.
- 9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 10 Penal Code section 5000.
- 11 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
- 12 Penal Code section 5054.
- 13 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to

Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 14 American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

As noted in 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13; typewritten version, p. 6, Procunier was to a significant degree further overruled by Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.

- 15 Section 3 of Statutes of 1975, chapter 1160, page 2876 provided:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections or the Adult Authority prior to the effective date of this act, shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976."

- 16 Government Code section 11342, subdivision (a). See Govern-

ment Code sections 11343 and 11346. See also 27 Ops.Cal. Atty.Gen. 56, 59 (1956).

- 17 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 18 See former Penal Code section 2931, operative July 1, 1977.
- 19 Penal Code section 2931, subdivision (a).
- 20 OAL was established July 1, 1980. (Stats. 1979, ch. 567, sec. 1.)
- 21 That is, there is no citation listing the statute giving the rulemaking agency pertinent rulemaking power ("Authority"); there is no citation giving the provision of law the agency is interpreting, implementing, or making specific ("Reference"). See Title 1, CCR, section 14.
- 22 Penal Code section 2932 specifies the procedures for the forfeiture of time credits accumulated pursuant to either Penal Code section 2931 ("goodtime credits" i.e., "conduct and participation credits") or Penal Code section 2933 ("work time credits").
- 23 The Assembly Committee on Criminal Justice Report for Assembly Bill 2954, Statutes of 1982, Chapter 1234, which amended Penal Code sections 2930, 2931, 2932 and 4019 and added sections 2933, 2934 and 2935 to the Penal Code, states that the purpose of Assembly Bill 2954 " . . . is to give prisoners a strong incentive to participate in work programs. Under the current system [Penal Code section 2931's "goodtime credits"] full good time and participation credits are awarded to voluntarily idle prisoners". The Senate Committee on Judiciary Report for Assembly Bill 2954 declared that "The purpose of this bill is to institute a work program in prisons that would train inmates and help make institutions more self-sufficient."
- 24 Penal Code section 2933 was amended in an enactment that took effect immediately as an urgency statute on May 31, 1988. The amendment became operative when the voters, at the June 7, 1988, direct primary election, approved Proposition 67, as proposed by Chapter 1006 of the Statutes of 1987.

- 25 The regulatory history of sections 3043 and 3043.1 of Title 15 of the CCR is as follows:

Sections 3043 and 3043.1 went into effect December 17, 1982, as emergency regulations. (See Gov. Code section 11346.1) A certificate of compliance was subsequently filed with OAL as part of the rulemaking process, completing the formal adoption of sections 3043 and 3043.1. Sections 3043 and 3043.1 were then filed with the Secretary of State and became effective on a permanent basis on April 16, 1983. In August 1987, another emergency file (primarily concerning inmate classification) was submitted to OAL. This emergency file was approved and went into effect August 7, 1987, through December 6, 1987. A certificate of compliance was subsequently filed, but the file was disapproved on January 4, 1988, for reasons not affecting sections 3043 and 3043.1. The same day the Department filed another emergency rulemaking file, which was approved and filed with the Secretary of State, effective January 4, 1988.

On June 2, 1988, OAL disapproved the permanent adoption of a rulemaking package intended to complete the process begun in August of 1987. The same day (June 2, 1988), OAL approved the emergency readoption of the regulations regarding inmate classification that became effective on an emergency basis January 4, 1988, and amendments thereto (secs. 3040 through 3379 of Title 15 of the CCR, nonconsecutive). The approval of the readoption by OAL was based upon the original finding of emergency, the Department's efforts to formally adopt the regulations, and the continuing need of the Department for the regulations. The readopted provisions were filed with the Secretary of State and became effective on June 2, 1988. A certificate of compliance must be filed with OAL by September 30, 1988, or the readopted emergency amendments will be repealed.

- 26 See 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, pp. 1685-1686,; typewritten version, pp. 4-5, for a description of the California prison inmate appeals (i.e., grievance) process.
- 27 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

- 28 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 29 Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal. Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.
- 30 Requester's February 1, 1988 Response to the Department of Corrections' first level of appeal reply states: ". . . I did sign a waiver to earn 1/2 time credits instead of 1/3"
- 31 Compare 1988 OAL Determination No. 1 (Board of Prison Terms, February 16, 1988), California Regulatory Notice Register 88, No. 9-Z, February 26, 1988, p. 644, n. 52; typewritten version, p. 22, n. 52 (OAL determined that BPT Administrative Directive No. 87/4 was a "regulation," in part because the issue of entitlement was subject to two legally viable interpretations, one contained in a Department of Corrections regulation, the other in Administrative Directive 87/4). A similar situation was involved in 1988 OAL Determination No. 9 (Department of Industrial Relations, June 9, 1988), California Regulatory Notice Register 88, No. 26-Z, June 24, 1988, p. ____; typewritten version, p. 10 (part of challenged rule applying to claims arising prior to clarifying statutory amendment violated Gov. Code sec. 11347.5; other part of challenged rule concerning application of legislative scheme to claims arising after effective date of amendment did not violate Gov. Code sec. 11347.5).
- 32 The following provisions of law may also permit rulemaking agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

- d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of Regulatory Determinations is a helpful guide for locating such information. The Determination Index, as well as an order form for purchasing copies of individual OAL determinations, is available from OAL, (916) 323-6225, ATSS 8-473-6225, 555 Capitol Mall, Suite 1290, Sacramento, CA 95814. The price of latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$50.

33 We wish to acknowledge the substantial contribution of Unit Legal Assistant Annemarie Starr in the preparation of this Determination.